IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

CASE NO. 15 CR-100 (GHW)

v.

HONORABLE GREGORY H. WOODS

SEAN MCCABE
______________________________/

**DEFENDANT'S SENTENCING MEMORANDUM**

**I - OVERVIEW**

This is not a case about an evil person, but of human frailty and Mr. McCabe's ability to recognize and take responsibility for his criminal conduct; then turn his life around for personal betterment all while dedicating himself to the charitable and selfless advancement of others.

By the time of this crime in June, 2014, Mr. McCabe had lost everything, including the courage to follow the law. Mr. McCabe lacked the moral courage or conviction to do the right thing. Instead, Mr. McCabe committed this crime for money. Mr. McCabe faced moral paradoxes and challenges as a human being; he chose the wrong and unlawful decision, and takes full responsibility for his actions and crime. Mr. McCabe was obedient, respectful and arrested without incident on December 2, 2014. Since his arrest, Mr. McCabe has been sincere, hard-working and straight-forward.

Those who have supervised and closely monitored Mr. McCabe for the past 18 months while held in pre-trial detention provide insights into his character, including his socially productive life since being incarcerated, and his willingness to work and strive for a greater good not only for himself, but for the entire inmate population.

Behavior is the product of brain function and Mr. McCabe's intellect, capacity to understand, and excellent communication skills have guided him through the past 18 months without one disciplinary write-up, while he created (literally) an educational curriculum that helps other inmates at New York's Metropolitan Correctional Center (MCC) develop significant life and career building skills. Close to 40 young men are currently taking classes at MCC that are designed and taught by Mr. McCabe. An additional 23 inmates have taken the tests necessary to be placed in the appropriate GED class (each inmate placement exam takes 7 hours and 5 minutes to complete). In the past 18 months many of these men have successfully passed their GED exams after being personally trained and tutored by Mr. McCabe. Mr. McCabe's voluntary, selfless work is unprecedented in the history of MCC (Documents supporting Mr. McCabe's educational program, syllabus's, calendar, work and MCC positive staff opinions/reviews are attached hereto). Mr. McCabe's work at MCC was saved in cabinets, indexed, and organized for his trained successor, Mr. Gilmore. Immediately upon his transfer from MCC to the Metropolitan Detention Center in Brooklyn, New York, on April 18, 2016, Mr. McCabe offered the same educational services.

Mr. McCabe is a 46 year old man who loves his family very much. Sadly, his father passed away when Mr. McCabe was 13 years old. Understandably, this caused a very turbulent time in Mr. McCabe's life. Notwithstanding the issues attendant to losing his father, Mr. McCabe still adores, loves, respects and remains personally and spiritually close with his mother and sister.

Mr. McCabe currently has no viable assets or funds, and based on his financial condition, a fine is not recommended.

Mr. McCabe respectfully requests he be sentenced to 23 months in the Bureau of Prisons (BOP), with credit time served, followed by 36 months supervised release. Mr. McCabe requests he be designated to FCI Miami, Miami-Dade County, Florida.

## II - INTRODUCTION

COMES NOW, SEAN MCCABE, through his attorney, Robert Gershman, pursuant to Rule 32 (f) of the Federal Rules of Criminal Procedure and the Local Rules for the Southern District of New York, and respectfully files his Sentencing Memorandum. Mr. McCabe moves for the imposition of a reasonable sentence not greater than necessary to meet the sentencing concerns expressed by Congress in 18 U.S.C. §3553. Mr. McCabe and counsel have reviewed the PSI and previously objected to certain portions of same [DE78].

Pursuant to U.S. v. Booker, 543 U.S. 220 (2005), the federal sentencing process has adopted a three step approach. (See Fed. R. Crim. P. 11(M) amended December 1, 2007). First, the Court is to resolve any disputed guideline issues and determine the advisory guideline range. Second, the Court is to consider if there are any factors that may warrant a departure from the advisory guideline range. As before Booker, the Court is to depart when it is warranted under the facts and circumstances of a particular case. "The application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered," U.S. v. Jordi, 418 F. 3d 1212, 1215 (11th Cir. 2005). Lastly, the Court is to consider all of the sentencing factors of 18USC§3553(a) and impose a sentence which is "reasonable" and not greater than necessary to achieve the sentencing objectives set forth in 18USC§3553(a). Mr. McCabe offers a compelling argument for this Court to impose a sentence significantly below the applicable sentencing guideline range.

## III - REQUEST FOR A REASONABLE SENTENCE

"Imposing a sentence on a fellow human being is a formidable responsibility. It requires a court to consider, with great care and sensitivity, a large complex of facts and factors. The notion that this complicated analysis, and moral responsibility, can be reduced to the mechanical adding-up of a small set of numbers artificially assigned to a few arbitrarily-selected variables wars with common sense.

Whereas apples and oranges may have but a few salient qualities, human beings in their interactions with society are too complicated to be treated-like commodities, and the attempt to do so can only lead to bizarre results." United States v. Gupta, 2012 U.S. Dist. LEXIS 154226, at *1-2 (S.D.N.Y. Oct. 24, 2012).

The Guidelines developed by the United States Sentencing Commission are to be used as a starting point only. Gall v. United States, 552 U.S. 38, 50, 128 S. Ct. 586 (2007). The Supreme Court has specifically held that reasonable policy disagreements with the sentencing guidelines are an appropriate basis for determining a sentence outside of the guideline range. Kimbrough v. United States, 552 U.S. 85, 128 S. Ct. 558, 570 (2007). Gall v. United States, supra, sets the standard for Federal Courts to follow in calculating a reasonable sentence:

> A District Court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, [s]he may not presume that the Guidelines range is reasonable. [S]he must make an individualized assessment based on the facts presented.

552 U.S. 38, 128 S. Ct. 586, 596-97 (2007).

Mr. McCabe respectfully suggests that, based on the facts and circumstances of his case, and in light of the factors enumerated in 18U.S.C. §3553(a), the appropriate sentence is one below the advisory Guideline range. Section 3553(a)(2) provides that this Court shall fashion a sentence which:

(A) reflects the seriousness of the offense, promotes respect for the law, and provides just punishment for the offense;

(B) provides adequate deterrence to criminal conduct;

> (C) protects the public from future crimes of the defendant; &
>
> (D) provides the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2)(A)-(D).

As this Court well knows, "[t]he Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable." Nelson v. United States, 555 U.S. 350, 352 (2009) (emphasis in original), Covington v. United States, 556 U.S. 1123 (2009), and Bain v. United States, 556 U.S. 1218 (2009). The Supreme Court has now made it clear that a District Court's exclusive reliance on a Sentencing Guidelines calculation is erroneous, and that a lawful sentence may not be imposed on the assumption by the District Court that the Sentencing Guidelines calculation is reasonable. It must, instead, be based on the statutory criteria in Section 3553(a), and the Court must explain what weight is being given to the statutory criteria at the time the sentence is imposed.

The Supreme Court unequivocally stated in Nelson, that "cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable." Nelson, 555 U.S. at 35. "[T]he numbers assigned by the Sentencing Commission to various sentencing factors appear to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology – thus maximizing the risk of injustice." Gupta, 2012 U.S. Dist. LEXIS at *4. Accordingly, the Guidelines are but one, and only one, of the factors to be considered by the District Court who must, after considering all the sentencing factors, "tailor the sentence in light of other statutory concerns." United States v. Ellis, 419 F.3d 1189, 1193 (11th Cir. 2005). Mr. McCabe respectfully asks this Court to consider the case law and principles pronounced by the United States Supreme Court when evaluating his ultimate guideline range and sentence.

## IV - REQUEST FOR VARIANCE BELOW THE APPLICABLE GUIDELINE RANGE

**(a) Instant Offense Conduct**

On June 6, 2014, Mr. McCabe unlawfully took $160,000 U.S. Currency in his carry-on bag on a flight from Florida to Panama. This $160,000 amount reflects the total $200,000 originally provided Mr. McCabe, minus $40,000 retained by Mr. McCabe as a fee for the crime/transaction. Mr. McCabe kept $13,000, and gave Mr. Dominguez $27,000. It was Mr. McCabe's understanding that the $27,000 would be split as follows: $2,000 for Mr. Dominguez, and $25,000 for Mr. Cristo-Fares. However, Mr. McCabe has no personal knowledge of how the $27,000 was split or disposed of at all. Following the instructions given by an informant working with the Drug Enforcement Agency (DEA), upon landing in Panama, Mr. McCabe called the number he was given and learned to whom, when and where he should turn over the money. Mr. McCabe followed the instructions and turned the cash over to an undercover agent in Panama. Thereafter, law enforcement waited six months for Mr. Cristo-Fares to enter the United States to contemporaneously arrest Mr. McCabe.

It is significant that during this six month waiting period, Mr. McCabe did not commit any new/other crime(s) or otherwise flee the country. Of course, the Government could make the argument that Mr. McCabe did not personally know he was the target of an arrest warrant during this relevant period. However, those who are involved in a life of crime continue criminal conduct, even when the criminal knows, or does not know the Government has the authority to arrest, but are waiting, for example, for the co-defendant to enter the United States. If Mr. McCabe were a career money launderer, had past connections to drug dealing, and/or was a recidivist, he would have continued his life of crime. However, no such criminal conduct was detected or reported to law enforcement between the delivery in Panama in June, 2014 and Mr. McCabe's arrest in December, 2014. Mr. McCabe's lack of criminal conduct during this period should be considered by the Court.

When Mr. McCabe was arrested, he cooperated fully, and was not belligerent or argumentative. He surrendered his IPhone immediately and gave the agents his passcode so there would be no encryption issues during the Government's telephone inspection. We can confidentially assume that while government had custody and inspected Mr. McCabe's telephone, if any person on his contacts list was a person of interest with regard to money laundering, drug trafficking, or other crime(s), their name would have been cross referenced with a government list and brought to the Court's attention. No such Government disclosure having occurred, these straightforward facts contradict the Pre-Sentencing Report (PSR) and show that Mr. McCabe is not a career criminal who specializes in money laundering. Mr. McCabe did not maintain a bank account in Panama, and had no connections to people who did. There was no shell company in which to deposit the money, and Mr. McCabe did not have access to a private jet, nor has he ever been on a private jet. Mr. McCabe was told to and communicated ("puffery") with the confidential source (CS1) after the trip to Panama. However, this was only talk, and no overt acts or criminal conduct. The PSR misrepresents these circumstances and mischaracterizes Mr. McCabe, the man.

Of note is the sophisticated means enhancement applicable to Mr. McCabe through his agreement with the Government. This argument is not intended to violate any terms of the agreement, but to make the following points: (a) Upon information and belief, Your Honor sustained the co-defendant's objection to the two points sophisticated means enhancement. Obviously, the co-defendant did not agree, as Mr. McCabe did, to this two point enhancement. But, there still remains this issue for the Court's consideration. The Final PSR does not include the sophisticated means enhancement (Offense Level Computation p8 & p23). Mr. McCabe announced to the Court, very early on (the first accused in this case to do so) his intention to accept responsibility and resolve the case. The Court may, for many reasons, take into consideration the manner and method by which Mr. McCabe resolved his case. Defense submits that while there is no dispute Mr. McCabe resolved his case with an early agreement that included the sophisticated means, Your Honor may still consider its own ruling as it applied to the co-defendant regarding same as it relates to the overall applicable guideline range and any variance that may flow therefrom.

**(b) Defendant's truly unprecedented accomplishments during his pre-trial detention in MCC**

After his arrest on December 2, 2014, on December 3, 2014, Mr. McCabe made his initial appearance in the Southern District of Florida, West Palm Beach Division. Undersigned Counsel appeared with Defendant, and immediately waived any Identification issues and agreed to Mr. McCabe's Removal to the Southern District of New York. On December 24, Counsel and Mr. McCabe initially appeared before Southern District of New York Magistrate Judge Francis. AUSA Emil Bove represented that pre-trial detention should only be granted on bases of flight risk. (Transcript pages 6-7 & 15). His Honor granted the Government's Motion to detain Mr. McCabe. (A copy of the detention hearing transcript is attached). Both parties proffered to His Honor their respective positions (Transcript pages 6-16). Defense believes that although Judge Francis detained Mr. McCabe, the facts, having now been fleshed out, support Mr. McCabe's previously requested pre-trial release. Mr. McCabe does not have the ability to flee this Court's jurisdiction. As more fully discussed below, and in the attachments, Mr. McCabe lawfully tried to conduct business in Columbia, through a highly respected local Columbian counsel, the Columbian Government and the applicable Columbian laws. There exists no evidence that Mr. McCabe has/had the ability to flee or otherwise has/had any unlawful ties to Columbia.

Since Mr. McCabe's arrival in New York (until approximately three weeks ago), he was housed in MCC. Unlike any other inmate ever at MCC, Mr. McCabe (voluntarily and without accepting the MCC offered pay) has literally authored and implemented an educational program to help all MCC inmates. MCC considers it Mr. McCabe's program. Mr. McCabe has created and teaches many different kinds of classes. He teaches the Graduate Equivalency Diploma class; having taught himself Spanish since his confinement, he teaches English as a Second Language; a Spanish Language class for those who speak only English; and a program with numerous courses in Adult Continuing Education, which focuses on career skills. Though volunteering his own time limits the number of programs he can personally participate in, Mr. McCabe has earned certificates for completing programs in Mandarin Chinese, Toast Masters International, and Reflections. While participating as often as he can to improve his own skills, Mr. McCabe remains available to the MCC inmates for tutoring, review, and practice testing. Mr. McCabe administers practice tests provided in previous versions of GED study materials, and then consults with the inmates in the specific areas each need remediation before the student inmate takes the state administered exam. Mr. McCabe has recruited and coached other tutors so that his program will continue to prosper in MCC after he is/was moved. Mr. McCabe approximates he has volunteered approximately 2,100 hours to the MCC McCabe educational program (based upon an average 30 hour week for 70 weeks). Among the numerous exhibits to this Memorandum are ones that address these educational issues and Mr. McCabe's unprecedented contributions to MCC, its staff and inmates. For example, in one document titled "Work Performance Rating," Mr. McCabe's cooperation, drive, and personal motivation are noted, while the supervisors comment that Mr. McCabe leaves a "positive imprint on his peers." It is truly rare for the facility staff and supervisors to write that a person whose crime was money laundering and who is referred to as a "former drug trafficker" actually and really has a "Positive impact on the institution." Mr. McCabe asks the court to take into consideration that the MCC staff find him cooperative, dependable, performs superior work, and would recommend that he be "promoted to a more demanding job at a higher pay rate." Mr. McCabe has demonstrated remarkable attitude, conduct, insights and maturity, and prays the Court to measure his character by the role he has played in voluntarily influencing the lives of others at the MCC. We who labor in the criminal courtrooms across our great Country strive to find an inmate like Mr. McCabe: A man who has truly turned his life around during since his arrest and before sentencing, without Court Order or mandate other than Mr. McCabe's own will and desire for the primary benefit of others; and while doing so, has already rehabilitated himself greater than any accused has done before sentencing.

"Out of your vulnerabilities will come your strength" - Sigmund Freud.

**(c) Family Ties, Education and Work History**

Your Honor is permitted to consider a variety of factors "not ordinarily relevant" in sentencing. The PSR states that there was no abuse, neglect or poverty in Mr. McCabe's early childhood. This is true. Both his parents were successful hard working, career focused entertainment lawyers. The Governor of California appointed Lucy K. McCabe, Mr. McCabe's mother, a superior court judge in 1977, and Her Honor has run unopposed since.

Trauma, however, knows no socio-economic boundaries. Mr. McCabe's father, by his mother's report, was demanding and hypercritical of his children. From her perspective, her husband William McCabe did not know how to relate to young people. After the couple divorced in 1976, Mr. McCabe's emotionally unavailable and distant father became distinctly more remote and interaction with a positive male role model was virtually nonexistent. In 1982, Mr. McCabe's father, William McCabe, was diagnosed with lung cancer. He was living alone at the time and succumbed to the disease a year later. At 13 years old, Mr. McCabe was alone with his father when he died; and the young boy had the traumatic and emotional burden of breaking that news to his mother and older sister, Lauren. His mother, who is now 77 and on Senior Status as a Judge, recalls that it was a difficult age for her young son to be without his father.

Judge McCabe was a single mother raising two teenage children. Mr. McCabe and his older sister are four and a half years apart. This is just enough of an age difference between a teenage brother and sister to ensure that their school/social worlds rarely if ever overlapped. The PSR suggests that they didn't get along – this is inaccurate. It would be more truthful to say they went their separate ways. Ms. McCabe earned her master's degree in International Business from George

Washington University. She worked with a company in Bogota, Columbia for four years and then Colgate Palmolive in Sao Paulo, Brazil for years thereafter. Now, at age 49, she owns and operates a small specialty catering company in San Francisco, where she resides with her mother.

It has been said in jest that the Sixties is the decade that ended in the mid-seventies. Mr. McCabe's early childhood and adolescent years were strongly influenced by the culture of San Francisco in the Sixties. He experimented with drugs at an early age and had a significant cocaine problem by the time he was a teen.

In 1985 Mr. McCabe was sent to Marshall Hale Memorial Hospital's drug rehabilitation program. In 1988 Marshall Hale Memorial Hospital merged with Children's Hospital. In 1991 Children's Hospital merged with Pacific Presbyterian Medical Center to create the California Pacific Medical Center, which is now part of the Northern-California-based Sutter Health System. The hospital has not responded to our request for records. Mr. McCabe will attest to the fact that the rehabilitation program did not work and he continued using cocaine. In the late seventies therapy for substance abuse as we know it today was nascent. Mr. McCabe's drug problem persisted and exacerbated typical male adolescent behavioral issues. He was reticent, uncommunicative, impulsive, and exasperating. Judge McCabe, fearing that he was on a spiral of behavior that would lead to lifelong impairment and the criminal behavior that unfortunately accompanies addiction, sent her son to Provo Canyon School in Utah. The school at that time was called, by the not so politically correct term, a reform school. The rules were strict, the treatment was harsh and the punishments were rough. Mr. McCabe was at this school from December 1985 through February 1987. In that time period, Mr. McCabe changed his thinking about his behavior and when he left Provo Canyon School he remained clean and sober for 25 years. At an early age Mr. McCabe demonstrated extraordinary rehabilitative efforts. Mr. McCabe remains adamantly opposed to "street drugs" and his position is intransigent. Ms. Raff, his former fiancée, who has known him for 10 years, has never seen him use an illegal substance.

After Provo Canyon School, he transferred to Squaw Valley Academy, a boarding school in Olympic Valley, California. He fondly remembers his sister Lauren making the long drive to see him on weekends. He graduated from High School without incident in 1988. He enrolled in Western State College of Colorado in Gunnison, Colorado but did not complete his undergraduate work. In college he was involved with the student government activity, first as a student senator and then on the executive council where he worked as a liaison with bands and entertainment acts that were booked to perform at the school. He left school to pursue a career as a manager/agent in the entertainment business.

Mr. McCabe was born, Sean Fitzhugh McCabe in Palo Alto California in 1970. The PSR mischaracterizes his relationship with is mother saying they are not close. This is incorrect as Judge McCabe has consistently been in Mr. McCabe's life. She has provided guidance, advice, emotional and sometimes financial support as any concerned and loving parent would. Now, in her late seventies she uses the assistance of a motorized chair and long distance travel is arduous. She has not seen Mr. McCabe for three years. Before that she visited him regularly in Florida and before his resources were depleted by the mining venture in Columbia, he would travel to visit her. Mr. McCabe speaks with his mother every Sunday.

The letters written on Mr. McCabe's behalf agree that he is a good, kindhearted person. Whether it is because he is trying to quiet the echo in his memory of his father's critical comments or because he wants to prove to his mother that he can be successful, Mr. McCabe has been drawn to business ventures that had the potential of huge profits but also had commensurate financial risks. His mother says that he has bad judgment in business and his former fiancé says he fixates on a project, has a picture of how it should work out, works hard at it for a while, but the plan doesn't come to fruition.

In 1996, after years of friends telling him how smart he seemed, Mr. McCabe took the IQ test required to become a MENSA member. The organization's threshold IQ score is 135. Mr. McCabe scored 147 on the MENSA IQ test. Mr. Timothy Brooks who is the Manager of Membership and Admissions confirmed via email that Mr. McCabe was an inactive member. Mr. McCabe's intelligence certainly has served him in his creation of a school curriculum for MCC's educational effort. Mr. McCabe has the capacity to learn almost anything he puts his mind to and the limits are set by only by how long he stays challenged. His business career certainly follows this model.

Mr. McCabe was involved in owning or managing Gentlemen's clubs for more than 13 years. He saw the challenge in managing the food and beverage side of the business; the entertainment was a collateral issue to him. Judge McCabe traveled to Orlando to visit one of his clubs. Her mission was to determine if the women were being exploited. To her satisfaction, she met young women who told her that there were clubs that paid more money but they preferred to work for Mr. McCabe because they felt safer. He tolerated no drugs and employed sufficient staff to keep the women safe. Mr. McCabe even employed drug dogs and off duty Orange County Sherriff Officers to make certain the laws were followed and his employees were safe.

After he left the entertainment business Mr. McCabe became friends with Detective Fried of the Miami Dade Police Department at a local cigar bar. They talked about Mr. McCabe's experience with Gentlemen's clubs. The Detective spoke of 2 clubs in Miami Gardens, Florida where there were shootings on a regular basis. Mr. McCabe, having the experience of starting this sort of establishment, explained how it might be shut down. Using street maps and zoning ordinances Mr. McCabe was able to plot for the Detective exactly how a certain club was in violation of zoning laws. Detective Fried was successful in shutting down the businesses. In appreciation of Mr. McCabe's help to law enforcement, Detective Fried gave Mr. McCabe a memento. It was a token "Brother Officer Badge" that was not an official recognition but certainly a gracious thank you from the police department for Mr. McCabe's willingness to participate with law enforcement (A copy of the Brother Officer Badge is attached).

The PSR speaks of Mr. McCabe's career as a professional poker player with innuendo that evokes a nefarious activity. This is an effort to imply and lead the court to think that a professional poker player somehow has links to the underworld of crime, drugs, and money laundering. It is a total misdirection. Mr. McCabe was a professional poker player, the reality of which is far more difficult than the mythology that surrounds the appellation:

> "The number of hands you have to play in order to be an expert
> is anyone's guess but … it is going to take a long time." 1

Mr. McCabe's career as a professional poker player lasted from 2005 to 2008. In a short period of time he was relatively successful. In 2007 Mr. McCabe was ranked 6th in the world by Card Player Magazine and his tournament earnings were published at $772,000. Mr. McCabe

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1 Etchells, P. (January 14, 20150). Is poker a game of skill or a game of luck? *The Guardian* https://www.theguardian.com/science/head-quarters/2015/jan/14/poker-game-skill-luck-cepheus-bot-program

immersed himself in the world of professional poker, and to the extent that he remained challenged, he mastered it.

Mr. McCabe wrote a column for Bluff Magazine the heading of which was a quote from Plato that translated into “Know thyself.” Mr. McCabe was in demand by the media for his play by play skills, math ability, knowledge and ability to articulate these poker playing traits to the viewers/readers. As a nondrinker, he wrote about diet, nutrition, and rest to have the stamina to stay alert for the lengthy hours at the tables. Mr. McCabe believed that to achieve inner peace and become an effective and prosperous poker player, you cannot exploit the demons (“tells”) in others until you exorcise your own demons. As his extraordinary behavior at MCC indicates, Mr. McCabe is a person who likes to get involved and have impact. The same was true in his poker career as he published articles, without remuneration, in magazines that are read internationally on strategy in poker. From his biography on Card Player’s Magazine’s website:

> Sean McCabe is a professional poker player who is adamant about the importance of proper nutrition and physical conditioning to be a great player. If that is the case, it is no surprise that McCabe has accumulated a number of major cashes. He won a preliminary event in the 2006 *Foxwoods Poker Classic*, for more than $204,000, and followed that with a second-place finish in the 2006 *World Series of Poker Tournament Circuit* championship. McCabe snagged almost $258,000 for that finish. (http://www.cardplayer.com/poker-players/13240-sean-mccabe )

During his brief career in the world of professional poker, Mr. McCabe was backed by a sponsor for buy-in fees to enter tournaments; and winnings were split on an agreed upon percentage. In addition to playing, Mr. McCabe’s contract required him to give live interviews in which he analyzed the tournament he just participated in that aired on line (http://www.cardplayer.com/poker-players/13240-sean-mccabe/videos.)

Mr. McCabe attempted to make professional poker his business. There was nothing illegal about it. Gambling is one of the most scrutinized industries. Nothing in his poker career would have served as his entre to money laundering or drug trafficking. He has no connections to the crime world, and there was little glamour about the poker world at his level. Life on the road, living out of a suitcase, and playing countless hands of poker on a daily basis became routine and the challenge of it faded. As with most of his other business ventures, Mr. McCabe walked away from it.

His next business venture was trading precious metals. As the PSR notes he worked for United States Metal for a year learning the business and then started his own company, Capital Metals Corporation, and ran it for a year. He closed that company, retooled, and opened World Precious Metal, Inc., which he operated while he tried to develop the mining opportunity in Columbia. One of his many skills is that Mr. McCabe is certified in Adobe Photo Shop, a program that allows for the design and creation of visual displays and brochures. He designed the brochures for his new company.

Dealing in precious metals is akin to dealing commodities except that in this realm there is an actual physical property; usually either gold or silver. Some people keep their gold and silver as a personal possession, but most put it in one of two depositories in Delaware. When the metal is in a depository it is as if it were a liquid asset and more quickly sold to capitalize on the market fluctuation. The vagaries in the precious metals market requires constant vigilance on worldwide markets and events that would cause market fluctuations. Traders make a commission on sales or purchases which can occur on short notice and the slightest fluctuation in the global price. Commissions can be lucrative but the job is both time intensive and stressful as clients making large investments in small fluctuations expect almost immediate results that require almost constant attention. Prior to the passing of the Dodd Franck Act in 2010, clients could leverage their actual assets and commissions were lucrative. The Act put a halt to leveraging, so on balance commissions were not equal to the vigilance and attention to accounts and Mr. McCabe again walked away from this business venture.

Among the many unique skills Mr. McCabe possesses is being certified in the following areas: Professional Association of Diving Instructors (PADI); Emergency First Responder (EFR); SCUBA Rescue Diver (not to be confused with certified to dive as tourists do at a resort); Deep Water; Wreck' Exotic Gases; and Search and Salvage. The study and physical tests to become certified in these areas are demanding and rigorous. The EFR ranking certifies that he has skills and techniques to respond to situations of life threatening emergencies. Certified as an EFR, Mr. McCabe is qualified to provide every chance of survival for an injured person while waiting for emergency medical services to arrive. In such situations, his training would allow him to take charge when the panic and chaos of an accident or mishap creates a situation where serious and potentially fatal injury might occur. In fact, Mr. McCabe voluntarily helped the victims of a significant high speed highway head-on-collision in Orlando, Florida in 1999.

The mission of PADI, the goals of an EFR and the other certifications are an apt metaphor for Mr. McCabe's character and personality. The qualities and characteristics of persons who would take on the responsibility as a first responder in a crisis situation are a far cry from those of a solipsistic, self-absorbed, sociopath, who preys on people without care, feelings or empathy. Mr. McCabe is a rescuer; the kind of man who will go out of his way to help others. His maturity, cooperation in relating to his supervisors, using his intellect to teach others, and his self-control to avoid, arguments, confrontations, and fights while incarcerated, reveal that he is a much better human being than the person who was pushed by financial extremity to play a role in Mr. Cristo-Fares' drama with the DEA. Before his arrest Mr. McCabe demonstrated a self-sacrificing commitment to realize the all but impossible dream of a gold mine and to rescue his best friend and partner from financial ruin.

Mr. McCabe respectfully reminds the Court that he did not occupy a leadership role in this criminal event and that the offense in this case was initiated by law enforcement. There is no credible evidence that Mr. McCabe was immersed in a life of crime at the time of his arrest, and there is no credible evidence that Mr. McCabe is a danger or threat to others. This was an isolated incident and it is extremely unlikely that Mr. McCabe will ever be in this position again. Mr. McCabe prays the court to consider an individualized assessment of his extraordinary behavior, maturity, cooperation and remorse for all that has flowed from the misguided decision to carry money to Panama.

> "The thing that really hit me hard with the Sentencing Reform Act was that this art form – I considered sentencing to be an art and not a science – Congress tried to convert it into a science. And it's not a science. It's a human being dealing with other human beings. And it shouldn't be done by computers," Judge John Coughenour 2

An excessive term of incarceration will undoubtedly affect the relationships he has with his

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2 Van Meter, M. (2016, February). One judge makes the case for judgment. *The Atlantic; http://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/*

loving mother and sister. Mr. McCabe is asking for the opportunity to be with his mother and sister in a timely fashion and prays the Court show leniency in this regard.

In Gall v. U.S. 128 S. Ct. 586 (2007), the court found that "compelling family circumstances" justify a downward variance from the guidelines. The Seventh Circuit has held that the district court is required to consider a defendant's family circumstances and to provide an adequate analysis of how much weight, if any, they should command, U.S. v. Schroeder,536 F.3d 746 (7th Cir. 2008). The Ninth Circuit found that family ties may warrant a non-guideline sentence even if they do not support a departure, U.S. v. Menyweather, 447 F.3d 625 (9th Cir. 2006) (affirming a departure for family ties but noting that even if the court erred in departing, Booker now permits the court to consider family ties and responsibilities as part of the "history and characteristics" of the defendant under 18 U.S.C. 3553 (a)(1); U.S. v. Antonakopoulos, 399 F.3d 68, 81 (1st. Cir. 2005) (in bank fraud case, on remand district court may consider fact that defendant was caretaker for his brain damaged son as grounds for sentence below range even though there were alternative means of care so defendant apparently did qualify for traditional departure) U.S. v. Galante, 11 F.3d 1029 (2d Cir. 1997) (affirms district court's 13 level downward departure in drug case from 46-57 months to 8 days where defendant showed he was a conscientious and caring father of two young sons who would have faced financial hardships). Other courts including the 6th Circuit, 8th Circuit and the 10th Circuit have permitted downward variances based on family ties/responsibilities.

Since the advent of Booker, the Court may consider almost any facet of an individual's background, including Employment History, as a consideration for a downward variance. The Court is urged to consider Mr. McCabe's lengthy period of employment when imposing sentence. The following circuits have found an excellent work record a reason to depart below the applicable guideline range: U.S. v. Jones, 158F.3d 492 (10th Cir. 1992) (in departing downward three levels, the court considered "the defendant's long impressive work history…where good jobs are scarce) U.S. v. Big Crow, 898 F.2d 1326, 1331-32 (8th Cir. 1990) (excellent employment record); U.S. v. Jagmohan, 909 F.2d 61 (2d Cir. 1990) (exceptional employment record).

**(d) Circumstances At The Time Of The Crime**

The Court may depart from the Sentencing Guidelines on factors not taken into account in the guidelines. Mr. McCabe makes a plea that the court considers the totality of his circumstances at the time this incident occurred. Mr. McCabe was not involved in a life of crime when the DEA initiated this offense, the circumstances of which are unlikely to recur. He understands that the Court in sentencing must always weigh concern for the victims against the humanity of the defendant. There are no victims and Mr. McCabe has never been involved in this type activity. He is no threat to his community or to society. From 2012 until the time of his arrest, Mr. McCabe was consumed by a gold mining venture in Columbia, South America that was to be his life defining financial success.

In late 2012, Mr. McCabe met Mr. Dominguez socially, through a mutual friend who knew that Mr. McCabe worked in the business of buying, selling, and trading precious metals and that Mr. Dominguez, though Cuban, had twenty years ago been extensively involved in Columbia. Mr. McCabe and Mr. Dominguez had several casual, social conversations. Mr. Dominguez earned Mr. McCabe's trust. In their discussions, Mr. Dominguez spoke of the profits that could be made in the pit mines of Columbia digging for gold. He told Mr. McCabe that he had friends and connections in Columbia and, if he was interested, Mr. McCabe could visit Columbia to see a mine in production. Mr. McCabe agreed to travel to Los Tubos, Columbia to inspect the production of a gold mining operation as a model for a possible business venture. There he met Jose Urrego, a native of Columbia, a friend of Mr. Dominguez and a person that was to figure prominently in Mr. McCabe's life thereafter.

Mr. Raff, who is the father of Mr. McCabe's former fiancé, Ms. Molly Raff, accompanied Mr. McCabe on the trip to Columbia. Mr. Raff's career and experience is in heavy construction and he previously owned a company that built bridges and installed retaining walls to hold back lakes and rivers so development could ensue. Mr. Raff moved his company from California to Florida and for a time was successful. He bid on several large construction projects in the Orlando area. He won the bid on one project, a bridge, but those initiating the project decided not to follow through on the project. Mr. Raff had to pay the consultants and engineering experts he had employed to construct the bid. Those exorbitant costs combined with the financial turmoil of 2007 and 2008 caused Mr. Raff to lose his business, his investment, and his home. Mr. McCabe thought that Mr. Raff might be interested working with him to develop the mine as a business venture and Mr. Raff's expertise with excavation would be of value.

The mine they visited in Los Tubos, Columbia was crude but productive and they witnessed the backbreaking labor that went into producing the kilos of raw gold ore. Mr. McCabe contracted malaria on this first trip. Mr. McCabe purchased several grams of the ore and brought it back to Florida where he had it assayed at DK Metals. The ore was of high quality and Mr. McCabe and Mr. Raff decided to pursue developing a mine site of their own.

Because Mr. McCabe's Spanish was not as proficient as it is today, all contact and communication with Mr. Urrego in Columbia to arrange the details of the trip came through Mr. Dominguez. Subsequently, all communication about the day-to-day operation of the mining venture came through Mr. Dominguez. Ultimately, control of the venture by controlling the communication became a tool by which Mr. Dominguez manipulated Mr. McCabe by generating a fear that he, Dominguez, could call off the venture on his own at any point and all the investment money (more than $200,000 invested by Mr. McCabe and Mr. Raff) would be lost.

The trip to Los Tubos, South America took place in 2013. Before they left Los Tubos, Mr. Urrego showed Mr. Raff and Mr. McCabe the pit mine and took them through the step-by-step process by which tons of dirt and gravel were washed to expose the gold nuggets that washed down in the underground streams from the Andes. Within a week of returning from Columbia, Mr. McCabe received word, through Mr. Dominguez, that the mine they visited had collapsed and was destroyed. It seems the Los Tubos pit mine they visited was dug too close to a river and the water seeping through the pit walls eventually led to the collapse. Mr. McCabe almost immediately took a second trip to Los Tubos, while still ill with malaria, to assess the disaster and investigate for himself and Mr. Raff what the worst-case scenario might be. The proximity of the mine to the river was an error in planning that could easily be avoided with Mr. Raff's expertise; and they decided to go ahead with their plan to develop a pit mine (photos of these mining issues are attached).

Mr. McCabe made several subsequent trips to Columbia. On these trips he worked to set up a corporation to do business in Columbia. In Bogota, Columbia he employed a lawyer by the name of Maikael Nisimblatt to act as his agent and paid a fee of $8,500 to form and incorporate his new company, Phoenix Investment Group SAS, in Columbia (receipts and papers of incorporation are attached). Mr. Nisimblatt from time to time requested additional fees. Mr. McCabe registered with the Chamber of Commerce in Bogota so he could open a corporate bank account; the company got tax identification numbers; he received a Columbian Investor Visa to legally do business in

Columbia. With Mr. Urrego, who was under the direction of Mr. Dominguez as his liaison, Mr. McCabe acquired permission to develop a mine on the property of Mr. Manuel Mosquera (copies of these business and government forms are attached).

The property leased from Mr. Mosquera was in Choco, approximately 100 miles (but a full day's drive on poor roads) from the mine site in Los Tubos that Mr. McCabe visited with Mr. Raff. Mr. Urrego was the man on the ground in charge of getting the site set up for production. Because a pit had already begun at the site, Mr. McCabe and Mr. Raff believed that production would begin almost immediately.

An excavator is the most crucial piece of equipment in a pit mine operation. The excavator that Mr. Urrego had procured became the bane of this venture. Accidents, mishaps, and catastrophes led to seemingly never ending requests for additional funds. During transport of the excavator, a flash flood washed over the truck it was on and the excavator landed on its side in the stream. Mr. Urrego, used the huge arm of the machine to push it into an upright position. During this effort, because the motor was not in a vertical position, lubrication could not reach the cylinders causing the motor to overheat and burn out. Money was sent to rebuild the motor. In rebuilding it all new hoses were required for the hydraulic system that operated the massive arm and shovel. More money was sent. With new hoses the proper pressure level was reached causing a unique hydraulic valve to fail. Mr. Urrego could not find the part. Weeks had passed, money was being used rapidly, and no ore was coming out of the pit. Mr. McCabe undertook the task of finding the unique valve. He is computer savvy and searched the internet for parts to this older excavator. He found it at a supply shop in Oregon. It cost $1,000, and he personally delivered it to Quibdo, Columbia where Mr. Urrega was to pick it up. While there Mr. McCabe asked if he could go to the mine site and was told by Mr. Dominguez that it was too dangerous for him to travel in that part of Columbia. Mr. McCabe insisted on going but Mr. Dominguez would not tell him where the mine was or facilitate safe passage. Mr. McCabe returned to Florida and waited for word that the excavator was repaired and the mine was in production. A week later he received a message through Mr. Dominguez that the excavator had burned. (Photos of the excavator and copies of the money issues are attached).

The operation was suspended until $10,000 could be found for a down payment on a new/used excavator. This was a devastating blow; Mr. McCabe had during the course of 2013 and 2014 sent $53,000 over and above the initial investment. Mr. Raff had sent a comparable amount as well. Each time a request from Mr. Dominguez came for more money Mr. McCabe was assured that it was short term and that the mine would be up and running very soon (copies of these additional money payments are attached).

Both Mr. Raff and Mr. McCabe invested everything they had in the venture. Mr. Raff invested his retirement savings and $40,000 his wife inherited. Because they believed that production at the mine was eminent, Mr. Raff procured a $25,000 loan and put all of his heavy earth-moving equipment up as collateral (the equipment is worth considerably more). The loan terms were for 120 days at a usurious rate. He lost both the money and his equipment. Mr. McCabe invested his life savings, lost his condominium (he was evicted), and lost his car and almost all his personal possessions. As a result, Mr. McCabe moved into a less than 1,000 square foot house with Mr. Raff and his wife. Each time there was a request for more money, Mr. McCabe was assured by Mr. Dominguez that it was short-term issue and the money would be returned within days.

Mr. McCabe believes the Court should consider the totality of the circumstances that led to his state of mind at the time of the instant crime, and the crucial moment in the progression of events the Court might consider in a favorable light to Mr. McCabe. Both Mr. McCabe and Mr. Raff were out of money and had exhausted all their resources to borrow more. In early 2014, both Mr. Raff and Mr. McCabe believed they were at a “point of no return.” Mr. and Mrs. Raff were in default on their mortgage. Mr. McCabe was anxious, worried and depressed about the situation they were all in and he had begun to drink heavily. The mining venture became a “money pit” and both Mr. McCabe and Mr. Raff had invested so much time, energy and money they could not back out; both felt that the way out was through.  Mr. McCabe was 44 at the time. Mr. Raff was in his mid-sixties and but for his crushing sense of responsibility for Mr. Raff's financial situation, Mr. McCabe could have walked away from the mining venture, re-invented himself again, and begin a new career. Mr. Raff did not have the same options. Mr. Raff was unaware of Mr. McCabe's intended and actual criminal conduct. Mr. McCabe always sought to help and protect Mr. Raff, not involve Mr. Raff in this crime. But for his sense of responsibility, Mr. McCabe would have never agreed to Mr. Dominguez's proposal to carry money to Panama. This is not intended to excuse Mr. McCabe's criminal conduct. These issues are intended to explain the circumstances leading up to Mr. McCabe's inexcusable criminal conduct.

When the DEA was organizing its plan to capture Mr. Cristo-Fares, Mr. McCabe was consumed with the mine venture, deeply in debt, and feeling overwhelmingly responsible for bringing Mr. Raff financially into this adventure. It is important to note that Mr. Raff and his wife do not feel that Mr. McCabe talked them into their participation in any way. They are completely supportive of Mr. McCabe and the continued friendship is sincere, solid, and deep. Mr. Dominguez was well aware of the financial straits of both men and the expense that would have to be incurred for the mining venture to continue. Mr. Dominguez approached Mr. McCabe with the proposition to carry money to Panama. When Mr. McCabe carried the money to Panama, he was led to believe it was drug money. Mr. Dominguez also made it clear that these men were with Mr. Cristo-Fares. In hindsight, Mr. McCabe may have created his current situation because he was drawn to a risky and perhaps implausible, get rich quick, adventure in the jungle that never came to fruition rather than a sound business venture. Carrying this illegal money to the DEA is an isolated incident for which Mr. McCabe has taken full responsibility and shown remorse. The likelihood of such circumstances recurring is beyond remote.

Reasons given by Courts to sentence below the applicable guidelines pursuant to 18 U.S.C. 3553 include: History of the Defendant; Avoid Unwanted Disparities; Charitable good works/good deeds; Circumstance of the Offense; Reflect seriousness of Offense; Respect for the Law; Adequate Deterrence; to Protect the Public From Future Crimes; and Harsh Pre-trial Detention Confinement Conditions. For the reasons set forth herein, Mr. McCabe suggests he has conducted himself, and in the future will conduct himself, in a manner that fulfills each of reasons Courts impose sentences below applicable guideline calculations.

Attached to this Memorandum, and specifically incorporated herein, please find the following exhibits intended to support the issues contained in this Sentencing Memorandum:

A. Mr. McCabe's MCC Positive Reports, Educational and Certificate papers (17 pages);
B. Mr. McCabe's Miami Police Department Brothers Badge (2 pages);
C. Mr. McCabe's photographs from Columbian Gold Mine (20 photos);
D. Mr. McCabe's Columbian Attorney and Incorporation documents (12 pages);
E. Mr. McCabe's Money-grams sent for the Columbian Gold Mine (29 pages);
F. Mr. McCabe's Columbian bank checkbook - front cover and first page (2 pages);
G. Mr. McCabe's Columbian Attorney, Bank, Government Records (60 pages);
H. Two Letters in support of Mr. McCabe (5 pages); &
I. Mr. McCabe's Detention Hearing Transcript dated December 24, 2014 (19 pages).

**V - CONCLUSION**

Mr. McCabe asks the Court to consider him holistically. Fidelity to 18 U.S.C. 3553 strongly supports a sentence well below the applicable guideline range. Mr. McCabe led a good life before his arrest, and has improved his and others future since his incarceration. Accordingly, the unique and substantial mitigating factors contained herein support a lenient sentence. Mr. McCabe can serve his incarceration and exit the Bureau of Prisons a productive member of society while on supervised release and thereafter; he is not a risk of reoffending. Mr. McCabe can be an asset to his family, society and friends upon his release. Mr. McCabe has the necessary tools to give the Court confidence that he will keep his promise to maintain a crime free life.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been respectfully submitted via electronic filing on May 19, 2016, and two copies delivered to His Honor.

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